No. 7768

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

KEMP-BOOTH COMPANY LIMITED,
a corporation,

Appellant,

vs.

J. M. GALVIN, as Trustee in Bankruptcy of the House of Irving, a corporation, bankrupt,

Appellee.

APPELLANT'S BRIEF

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

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This is an appeal from a decree in favor of J. M. Galvin as trustee in bankruptcy of the House of Irving, a corporation, vs. appellant, Kemp-Booth Company Limited, allowing a recovery for alleged unlawful preferences (R. 53). Appellee sued to recover three items of alleged unlawful preferences. The first item was for $700.00 received by appellant

from the bankrupt within four months of the bankruptcy. The Learned Trial Court allowed a recovery of $600.00 upon that item. The assignment of errors (R. 112-113) raises no issue in this court upon the accuracy of the decree upon that item. The other two items upon which the suit was brought are, however, questioned on this appeal. The second and third items upon which the trustee in bankruptcy sued (R. 3 and 4) were for the recovery of accounts receivable aggregating a face value of $2,694.25 (R. 3) and the recovery of woolen suitings of an alleged value of $3,500.00 (R. 4). Appellant admitted receiving assignments of accounts from the bankrupt and also the receipt of woolen suitings (R. 8) but pleaded affirmatively that the assigned accounts arose from the sale of woolen suitings and that the merchandise recovered was other woolen suitings, the property of appellant, which it had delivered to the bankrupt pursuant to a consignment contract in which the title to the goods and the proceeds thereof to the extent of the value of the woolens in the account, remained in appellant and that therefore the said materials were not a part of the bankrupt's estate (R. 10, 11, 12). The consignment contract is set out in full (R. 14-16) in the decision of the Learned Trial Court, who held that:

"With the tenth provision in this contract the transaction was one of sale and not consignment." (R. 21.)

The terms of the contract are as follows. It is dated July 26, 1930, between Kemp-Booth Company Limited, a corporation, as first party, and House of Irving, a corporation, as second party.

1. First party agrees during the life of the agreement to consign from time to time such of its goods to second party as are suitable for sale for first party by second party.

2. The value of said goods in the possession of second party shall at no time exceed $3,000.00.

3. Second party shall receive such commission for selling the same as may be stipulated by first party.

4. Second party shall account to and settle with first party on the first day of each and every month during the life of the agreement at the sale price fixed by first party for all merchandise covered by the agreement sold during the previous month, less commission. Second party guarantees the collection and prompt payment on the first day of each month of the sale price of all merchandise sold during the previous month.

5. Second party shall furnish first party a monthly inventory of the exact merchandise held by it for first party on the first day of the month, beginning September 1, 1930.

6. Second party shall insure all the merchandise against loss by fire and burglary in policies running to first party and keep the merchandise segregated from other merchandise on the premises.

7. Either party may terminate the agreement by giving three days' written notice and at termination all of the goods of the first party in the possession of second party shall be returned to first party.

8. First party shall have the right to check up and inspect and/or withdraw any or all of the merchandise at any time without notice.

9. The title to all such consigned merchandise shall remain in the party of first part and second party shall have no title thereto, but the right to sell the same for first party under the terms and conditions stated. Prices and terms on which the same may be sold are to be furnished from time to time by first party.

"10. The party of the second part shall have the the right, until otherwise directed in writing by the

party of the first part, to make up any part or parts of said merchandise into garments, but in such case the title to all such garments shall remain in the party of the first part; and on the sale of any and all such garments the party of the second part shall receive and retain for their services and expenses in making up such garments such part of the selling price as shall exceed the sale price of the consigned merchandise used therein, as well as the usual commission on such merchandise." (R. 14-16.)

It is the foregoing paragraph which in the opinion of the Learned Trial Court rendered this transaction "one of sale and not consignment." (R. 21.)

Findings of Fact were signed by the court in accordance with his decision (R. 22-31). Appellant proposed findings upon its theory of the case (R. 35-45) and duly excepted to the findings made and refused (R. 34, 46-52). Whereupon an appeal was taken to this court (R. 111-122).

In the lower court (and we assume in this court) appellee also contended:

1. That creditors subsequent to the date of the contract of consignment on July 26, 1930, were ignorant of the same and that it was therefore a fraud upon them.

2. That where alleged consignee may sell at his own price, being bound to pay for the goods at a fixed price, the transaction is a sale.

3. That the failure to require the proceeds of the sales to be held as trust funds is fatal to a consignment arrangement.

4. That failure to keep the consigned goods separate is fatal to the consignment.

5. That payment by the alleged consignee of insurance is a badge of a sale and not a consignment.

6. That the alleged consignment agreement was not lived up to and was therefore fraudulent as to creditors, in that

(a) The bankrupt did not account monthly on the first of the month;

(b) It did not furnish an inventory of the exact merchandise held by it on the first of each month;

(c) The bankrupt did not cover the consigned merchandise with burglary insurance; and

(d) That (in line with the holding of the Learned Trial Court) the cutting up of the woolens and its manufacture into suits destroys the con-

signed merchandise and constitutes a sale to the bankrupt.

ASSIGNMENTS OF ERROR.

The case is before this court on six assignments of error (R. 112-113), which raise the simple question whether the consignment contract before set out really creates an agency and not a sale and if so, whether appellant has committed any act thereunder which estops it from contending that the relationship was one of agency.

DISCUSSION OF THE FACTS.

While we believe the record in relatively unimportant particulars contradicts Mr. Irving, the president of the bankrupt, who testified for appellee, still in the main the record is free from contradictions in any important matter.

It is current practice with most all woolen houses to have part of their merchandise handled by tailors on consignment. Appellant in the eleven years preceding this trial had about twelve such accounts in Seattle. Its consignment practice was adopted after consultation with its attorneys. All such accounts have been handled under a contract upon the form which was introduced in evidence in this case. The consignment contract with this bank-

rupt was handled no different from any other of the consignment arrangements of appellant with other tailors (R. 72). The bankrupt during the same period had goods on oral consignments from three other woolen houses. Just prior to the bankruptcy the bankrupt returned the consigned goods to the other woolen houses (R. 84, 89, 100). The record does not disclose a suit by appellee for the recovery of any other consigned goods.

The head office of appellant is in Seattle with branch offices in San Francisco and Los Angeles, which also send goods out on consignment (R. 75). The Seattle office keeps a control record in the form of index cards of every bolt of woolens received. The card contains the number of the pattern and the number of the mill which produced the goods, together with the original selling price per yard and the number of yards received in the bolt (R. 74), When goods are sold from the bolt the number of yards in the sale is recorded on the card, a subtraction made and the number of yards left in stock is shown (R. 75). When, however, goods are sent out on consignment and not by sale or when stock is forwarded to the San Francisco or Los Angeles houses of appellant, a separate column is used for each (R. 75). Each customer to whom goods are sent

on consignment is given a letter. The bankrupt's letter was "M" (R. 76). When a consignee disposed of the goods the subtraction was then made. When the San Francisco or Los Angeles house sent out goods on consignment that was reported to Seattle and on the control card there was then noted, for example, "S. F. memo." (R. 75). If the tailor to whom the suit pattern was sent on consignment did not dispose of it, it might be called back, a record made on the control card and then it might be sent out to another tailor or, of course, sold outright.

So that the control record of the particular bolt at all times showed the amount of the pattern on hand, the amount which had been sold and the location of each suit pattern which had been cut off of the bolt and which had not been sold (R. 74-75). In addition to the control stock card appellant kept a card for each length of woolens delivered on consignment. These cards were kept in a separate place (R. 75).

Upon a monthly check-up of the consigned merchandise when it was found that the tailor had sold a suit pattern, the same was then charged upon a regular invoice (R. 76) posted in the ledger (R. 60-64) and reported to the stock clerk, who made her record of the disposition of the suit pat-

tern. The foregoing method applied to the bankrupt and to all other consignees (R. 77). Consigned merchandise is frequently returned and when that occurs the record of the goods in the possession of the consignee is credited with the return of that particular suit pattern by the stock record department, but no accounting record is made. If the returned merchandise was goods which had been sold outright, a credit memo was, of course, issued (R. 74). Paragraphs 4 and 5 of the contract (R. 14-15) required the bankrupt to account to and settle with appellant on the first of each month, and to furnish an inventory of the exact merchandise held by the bankrupt for first party. Appellee objects that no such practice occurred. What did happen was that by subsequent arrangement with the bankrupt, appellant sent a representative each month to check the consigned woolens to ascertain what had been disposed of, upon which occasion a memorandum was made of the merchandise sold and demand made on the bankrupt for payment (R. 70). Manifestly, this method would compel the bankrupt to observe the contract better than would adherence to the practice fixed by the contract. The clerk who checked the stock in the possession of the consignee would report by stock number the items which he found in

the possession of consignee. A clerk in the stock record department of appellant took the individual suit pattern cards of the woolens which were in the possession of consignee and by use of a date stamp indicated upon that card that that particular suit pattern was still in the possession of consignee. All such cards showing all transactions with the bankrupt were introduced in evidence (R. 76). So that upon the card index record of each particular suit pattern its history in the possession of consignee could at all times be ascertained. On each monthly check-up it would be found to be there and when it was missing the *del credere* factor under the fourth paragraph of the consignment contract (R. 15) was then billed for the merchandise. The record of financial transactions with consignees who received goods bought on direct sale and on consignment was for practical reasons kept in one account. Appellant's account with the bankrupt is set out in *haec verba* (R. 56-64).

Prior to the execution of the consignment contract on July 26, 1930, there had been trouble between appellant and the bankrupt (R. 80.) Up to that time the bankrupt's limit of credit had been $750.00 (R. 106). His open account then stood at $485.59. When the consignment contract was exe-

cuted his credit limit on straight sales was extended to $3,000.00 (R. 106). The consignment contract (R. 14) provided that the limit of the consigned goods to be placed in the possession of bankrupt was $3,000.00.

Of the 122 items shown on the ledger account of appellant with the bankrupt (R. 60-64) Mr. Garrett, secretary-treasurer of appellant, identified 25 of the 122 items as being on account of goods sold from consigned stock (R. 64). This identification was made by the fact that the charges made for consigned merchandise are always billed, "cash 7 per cent," or, "net cash," while no other merchandise is billed that way (R. 69).

When a payment was made to appellant by a customer it was given a payment number and the application of the payment upon the debit side of the ledger was shown by also writing that payment number against the particular item or items to which the payment was applied. These payment numbers will be found to the left hand side of the column headed "charges" and to the left hand side of the column headed "credits" in Exhibit 1 (R. 56-64). Exhibit 1 shows that 24 numbered payments were made by the bankrupt from the beginning of his account in 1926. The first payment after the con-

signment account was made (R. 60) is payment No. 7 on September 12, 1930.

Identifying the charges and payments for the sale of consigned goods by the bankrupt in accordance with the testimony of Mr. Garrett and checking the same against Exhibit 1 we find that the consigned merchandise was charged and paid for as follows:

RECORD OF CONSIGNMENT CHARGES AND PAYMENTS.

Date of Charge	Amount	Date of Payment	Payment No.
9-12-1930	$153.68	9-12-'30	7
10- 7-1930	149.19	10- 9-'30	8
11- 4-1930	68.76	12-11-'30	10
12-10-1930	88.28	12-11-'30	10
12-31-1930	80.43	1-20-'31	11
2- 5-1931	424.27	3-12-'31 (150.00)	13
		3-19-'31 (274.27)	14
4-16-1931	65.00	4-29-'31 (136.60)	15
	254.61	5- 9-'31 (100.00)	16
	34.59	5-11-'31 (111.10)	17
		5-12-'31 (6.50)	18
5-15-1931	73.34	6- 9-'31	19
7-13-1931	105.85	7-10-'31	20
9-17-1931	151.67		
	15.42		
10-13-1931	47.92		
11-18-1931	95.42		
	10.00		
2-12-1932	1096.94		
	253.62		

Appellee contends that the consigned merchandise was not kept segregated from the other goods of the bankrupt as provided in the sixth paragraph

of the contract (R. 15). When consigned goods were delivered to the bankrupt each piece contained a tag bearing the Kemp-Booth Company monogram so that in checking them up the tags identified the goods. This ticket on the goods which was shoved into the end of the bolt of goods contained the initials "KB," the pattern number, the yardage and as a rule the price per yard in code. The bankrupt tried to keep these goods separate, but in handling and putting them back they would get mixed up. Once in a while the bankrupt would go through them and every week it checked up (R. 88, 100).

The record discloses that no inquiry was ever made by any creditor regarding the existence of the consignment agreement (R. 79) and while the agreement was not secret because the bankrupt had consigned goods from other houses in the same way, it is apparent that no voluntary disclosure of any of its consignment arrangements was made by the bankrupt (R. 89- 90).

While the merchant tailoring business is of such universal notoriety that the court would undoubtedly take judicial notice of its salient features, still the record does show the method in which the woolen goods in question was merchandised. The bankrupt never sold a suit pattern as such. No suit was made

until the bankrupt had an order for it. In every case the customer selected the goods, whereupon the bankrupt designed the suit, fitted it and made it for the customer. Upon delivery of the suit to the customer the sale was treated by the bankrupt as closed and was entered upon its books. Woolen for a suit is cut into 22 or 23 pieces and thereafter it is no good to anyone else (R. 90). In addition to the woolen suiting the tailor used fittings or trimming of which there would be as many separate pieces as there would be of woolens. Twenty-five dollars worth of woolens would take $6.00 worth of trimmings and a labor cost of $35.00. The woolen going into the suit would not ordinarily constitute more than one-third of what the customer paid for the suit (R. 91). The stock of consigned goods with the bankrupt varied; because they were coming and going all the time. Appellant often asked for the return of certain patterns and if the stock of the bankrupt were depleted it would ask for others (R. 85). Every few days patterns would be returned and exchanged (R. 96).

Paragraph six of the contract (R. 15) required the bankrupt to keep the consigned merchandise covered with fire and burglary insurance, policies running to appellant. The bankrupt had no burglary policy, but took out a $3,000.00 fire insurance

policy, loss, if any, payable to Kemp-Booth as its interest might appear (R. 97-98). It was turned over to appellant at once and has remained in its possession ever since (R. 100).

In his statement of assets at the close of the years 1929-1930 and 1931, the bankrupt's books showed a stock of woolens on hand (in round numbers) of $16,000.00, $12,000.00 and $6,000.00 respectively, none of which included the Kemp-Booth woolens consigned by them and later returned to them (R. 84-85).

The business of the bankrupt became bad and in the latter half of 1931 appellant continued to insist upon payments according to the agreement, but the bankrupt was unable to pay (R. 81, 82).

Mr. Booth had been east for three years prior to the trial, during which time Mr. Garrett has been in charge of the business of appellant (R. 105, 106). He testified that he knew of no particular in which the consignment contract was deliberately violated and that at all times appellant tried to exact absolute compliance therewith (R. 107-108). The bankrupt deposited moneys which it received from the sale of suits to customers in its bank account. Payment of running expenses, rent, salaries, labor, pay-

ments to other creditors and to appellant came out of that account.

Late in January, 1932 (R. 108), a check-up of the bankrupt's consigned accounts was made and it was then discovered that $1,096.94 worth of woolens were unaccounted for, entry of which was made on February 12, 1932 (R. 64). Except as will be pointed out in a moment no explanation of this shortage of materials of appellant has ever been offered. An examination of the account (R. 60-64) will show that it was impossible for that amount of merchandise to have been used since the last check-up on the 18th of November, 1931. The president of the bankrupt testified (and this is evidently where some of the merchandise was concealed), that he sent out some consigned patterns "as display samples to Associated Tailors. I think Kemp-Booth knew of this, *but I am not sure.*" (R. 100.) During the trial it was brought out that some of the woolens of appellant had been sent to a tailor named Merrill at Longview, Washington, concerning which Mr. Garrett said: "I did not know until long after the bankrupt proceedings that the goods had been sent to Merrill for display." (R. 106.) Whether some of appellant's goods disappeared by going to other tailors on display or by an act even more deliberate,

or whether clerks of appellant had not kept accurate check, there is no evidence in the record. Appellant's entire records of this transaction were produced on the trial and no sinister inference suggested in them nor in examinations of Mr. Garrett.

Late in January, 1932, the bankrupt disclosed to appellant that he could go no further. The consigned merchandise was returned to appellant and the bankrupt transferred to appellant accounts receivable to satisfy its open account against him (R. 108). Appellant insisted at the time that it should receive only those accounts which arose from the sale of its consigned goods and appellant was advised by the bankrupt at the time that the accounts which appellant received were those which arose from the sale of suits made from consigned goods (R. 108, 97). It was disclosed upon the trial, however, that that was not correct (R. 101), a fact which appellant first learned upon testimony to that effect by the president of the bankrupt (R. 108), as appellant did not have possession of the records of the bankrupt and could not check them up (R. 108). Mr. Garrett did check them during the trial, however (R. 102). On the accounts of bankrupt which had thus been assigned to appellant, appellant collected $905.50 (R. 25). Upon checking the records

of bankrupt during the trial Mr. Garrett discovered that of the 35 assigned accounts, only 12 arose from the sale of suits which were made from consigned merchandise, but the total collected thereon was $444.50 and that the consigned value of the cloth in these suits was $227.23 (R. 102). Upon the close of the trial appellant executed to the trustee in bankruptcy an assignment of all of the accounts which were still uncollected except three which arose from the sale of suits which were made from consigned merchandise (R. 110). During the trial it was stipulated that the value of the consigned merchandise which appellant received in January, 1932, was $1,652.23, which was 66⅔ per cent of its original value.

Thereupon findings and exceptions were made and a decree was entered by the court requiring the transfer to the trustee of three accounts still uncollected and giving judgment against appellant for the three items sued upon in appellee's complaint, together with interest upon each item to the date of judgment, to-wit:

(a) Six Hundred Dollars received by appellant in cash or by its bank in payment of trade acceptances within four months of the bankruptcy. The accuracy of this portion of the judgment is

not raised by the assignments of error upon this appeal.

(b) For the $905.50 which had been collected by appellant upon the assigned accounts, which includes the $227.23, the value of the consigned cloth represented in those accounts.

(c) Sixteen Hundred Fifty-two and 23/100 Dollars, the stipulated value of the consigned merchandise at the time of its return to appellant.

Section 3790 of Remington's Revised Statutes of Washington requires a conditional sale contract to be filed in the office of the County Auditor within ten days from the delivery of personal property sold on conditional sale. Sections 3781 and 3788 thereof require a chattel mortgage to be so filed within ten days from its execution. The consignment contract in question in this case was never so filed (R. 28, 29.) Appellant concedes that it received the merchandise and assignments of accounts within four months of the bankruptcy. As before stated, the Learned Trial Court held that paragraph ten of the contract in question made the contract one of sale. Appellee not only so contends, but also contends that other elements of the contract also made it a contract of sale and not one of consignment and

that appellant had violated the contract in such a manner as to indicate that it was a fraud upon creditors of the bankrupt. By reason of the lack of time to file a reply brief, appellant is compelled in this brief to answer those contentions of appellee of which appellant has any intimation. It is our contention that appellant was entitled to receive back its own consigned goods and to retain $227.23, the value of its materials which went into the assigned accounts.

ARGUMENT UPON THE LAW.

The Learned Trial Court set out the tenth paragraph of the contract as follows:

> "TENTH: The party of the second part shall have the right, until otherwise directed in writing by the party of the first part, to make up any part or parts of said merchandise into garments, but in such case the title to all such garments shall remain in the party of the first part; and on the sale of any and all such garments the party of the second part shall receive and retain for their services and expenses in making up such garments such part of the selling price as shall exceed the sale price of the consigned merchandise used therein, as well as the usual commission on such merchandise."

and held:

> "With the tenth provision in this contract the transaction was one of sale and not consignment." (R. 21.)

The Learned Trial Court cites four decisions in support of his opinion. The first is that of Judge Story in *Buffum vs. Merry,* (1824) 3 Mason 478, Fed. Case No. 2112, 4 Fed. Cas. 605. That was a case in which the owner of yarn delivered it to a manufacturer of cloth at the price of 65 cents per pound to be paid for in manufactured plaids at 15 cents per yard, the manufacturer agreeing as nearly as he could to use the plaintiff's yarn in making the plaids and to use for filling other yarn of as good a quality. Upon a contest between the former owner of the yarn and the creditors of the cloth manufacturer, Judge Story very properly held that the former owner of the yarn could never compel its return, but could only demand *in exchange therefor* plaids at the rate of 15 cents per yard to equal the value of the yarn at 65 cents per pound. Judge Story said:

> "Cotton yarn was here bargained for plaids, to be delivered at a future time at certain stipulated prices. When the bargain was completed by delivery of the yarn, the property in the latter passed to Hutchinson."

In the next case cited by the Learned Trial Court, *Commissioner of Internal Revenue vs. San Carlos Milling Co.,* (1933) 63 Fed. (2) 153, Your Honors were considering a contract between a Phil-

ippine sugar cane planter and a manufacturer of sugar. The planter, together with other planters similarly situated and operating under similar contracts, delivered cane to the manufacturer to be made into sugar. "It would not be commercially practicable to extract the sugar from each planter's cane separately." (Page 155.) By sampling the planter's cane, the sugar content was determined and upon completion of any particular milling operation the amount of sugar resulting from any particular planter's cane was ascertained. By the contract 40 per cent thereof belonged to the mill and 60 per cent thereof belonged to the planter. Thereupon a weight certificate evidencing the pounds of sugar which belonged to the planter in the fungible mass was issued to the planter and the mill always retained sufficient sugar on hand to deliver upon demand all of the sugar called for by the outstanding receipts. Your Honors held that that contract was a consignment agreement and not a sale. The Learned Trial Court could not have had in mind the decision of this court that the transaction was a bailment, but must have had in mind the language which Your Honors quoted (page 154) with approval from *Corpus Juris:*

> "Where articles are delivered by one person to another who is to perform labor upon them or to manufacture them into other articles for the former, the transaction is a bailment notwithstanding the articles are to be returned in altered form. But if the person by whom the articles are received may deliver in return articles which are not the product of those received the transaction is in effect a sale. * * * But it has been held that the transaction is not converted into a sale by reason of the fact that the manufacturer is to receive a share in the manufactured article by way of compensation."

Borman vs. U. S. (2nd Circuit Court of Appeals, 1919) (the third case cited by the Trial Court), 262 Fed. 26, was a criminal prosecution against the defendants for conspiracy to defraud the United States in the embezzlement of linings which had been furnished the defendant Borman by the United States under a contract whereby Borman was to use the linings in the manufacture of leathern jerkins for the United States. The defense was that at the time the defendants appropriated the linings to their own use the title in the linings had passed to the defendants and was not in the United States. The gist of the decision is contained in the following quotation (pp. 29-30):

> "It is elementary that where articles are delivered by one person to another, who is to perform labor upon them or to manufacture them into other articles for the former, the trans-

action is a bailment; but if the person who receives the articles may deliver in return articles which are not the product of those received, the transaction is in effect a sale. Now it is not necessary to inquire, for reasons which will presently appear, whether under the provisions of the contracts herein involved the delivery of these linings involved a bailment or a sale, whether the contractor was bound to use the linings which the Government delivered, or whether other linings might have been used in their stead. * * * But for the purpose of argument we shall assume that under the contracts there was a sale of the linings and not a bailment. Then the question arises whether or not under the sale the title had passed to the linings herein involved.

This court had under its consideration in *Re Liebig,* 255 Fed. 458, 166 C. C. A. 534, the question as to the time when title passes under a sale. We said in the case cited that in sales the transfer of the title depends upon the intention of the parties however indicated. And in *Hatch vs. Oil Company,* 100 U. S. 124, 25 L. Ed. 554, the general rule was said to be that the agreement as to the passing of title is just what the parties intended to make it, if the intent can be collected from the language employed, the subject matter and the attendant circumstances. We think the intent of the parties to these two contracts is clearly indicated in the language they employed.

The provision already referred to which provided that the contractor was to be liable to the United States for any loss of or damage to any of the materials furnished by it would seem to indicate that the title to the property *continued* in the Government and had not

passed to the contractor .

* * * * * * * *

Moreover, it was provided, as we have seen, that 'all rags and clippings from the linings "shall remain" the property of the United States,' that is to say, the title in the rags and clippings must under this language have been all the time in the United States.

* * * * * * * *

Assuming then, a sale, it is clear that the title could not have been intended to pass until the linings were cut out, and then only as to so much as were used in the jerkins."

So that whether the transaction is or is not a sale and whether the title to the goods does or does not pass is a question of the intention of the parties as gathered from the instrument even where the Government was to furnish the lining and buttons only, the contractor to furnish all other materials and was to be paid at a stipulated price for the leather jerkins which the contractor was to manufacture.

We submit that if it was proper in the *Borman* case to examine the contract to determine the intent of the parties that an examination of the contract in question will disclose that in this case nothing was ever to be returned to the consignor except:

(a) The identical goods which were consigned,

or

(b) The proceeds of a sale by a *del credere* factor after transfer of the title to the ultimate purchaser.

Even if the *Borman* case be regarded as an authority that when the woolen suitings delivered to the bankrupt in the instant case were cut off and manufactured into a garment, that title to the woolen suiting had then passed to the bankrupt, the *Borman* case is still an authority that until the suitings had been cut up there was no sale. The Circuit Court of Appeals in the *Borman* case say (p. 30):

> "Moreover, as it was never cut, but remained in the form in which it was received, no title passed, and it continued to be the property of the Government."

The last case cited by the Learned Trial Court as authority for his conclusion that the tenth paragraph of our contract rendered the transaction a sale is *Baltimore & Ohio R. R. Co. vs. Western Union Telegraph Company* (District Court, S. D. New York, 1917), 241 Fed. 162, 170. In that case the Railroad Company and the Telegraph Company by a written contract had agreed to an "exchange of services." The court quoted from *Buffum vs. Merry, supra,* the definition of sale or exchange

given by Judge Story in the following language (p. 170):

> "What is a sale or exchange? Blackstone says it is a transmutation of property from one man to another in consideration of some price or recompense in value. If it be a commutation of goods for goods, it is more properly an exchange."

It is evidently the foregoing language on account of which the Learned Trial Court cited the *Baltimore & Ohio Railroad Company* case and it must be that the court felt that the purpose of the tenth paragraph of our consignment contract was the "commutation" of our woolen suiting for the completed garment, because the title to the garment was reserved in the consignor. It is true that language to that effect does appear in paragraph ten, but even if paragraph ten be taken bodily out of the contract and be considered without any reference to the rest of the contract that paragraph goes on (R. 16):

> "And on the sale of any and all such garments, the party of the second part shall receive and retain for their services and expenses in making up such garments such part of the selling price as shall exceed the sale price of the consigned merchandise used therein, as well as the usual commission on such merchandise."

Appellee well urged in the lower court and the

record shows that after the suit was cut up for the particular customer, "it is no good to anyone else." (R. 90.) The purpose of the reservation of title in the consignor was not in order that the consignor might sell the suit in the usual course of trade; its sole purpose was to protect the consignor in the value of the consigned merchandise with the intent that the title to the garment should be immediately transferred by the tailor as the agent of the consignor to the ultimate purchaser, the consignor thereby retaining title to the proceeds of the sale and permitting the consignee to "receive and retain for their services and expenses in making up such garments such part of the selling price as shall exceed the sale price of the consigned merchandise used therein."

In fact, if the contract had provided that upon the manufacture of the suit the title to the manufactured garment passed to the tailor to be by him transmitted to the ultimate purchaser, the contract instead of being a contract of consignment and agency would have been a contract with an option to purchase. If this contract is invalid then it is not possible for wholesale woolen houses to consign their merchandise to merchant tailors.

The Learned Trial Court in his findings (R.

28-29) cites the Washington statutes which require the filing for record of conditional sale contracts and chattel mortgages. Appellant concedes that this contract was never so filed. Therefore, if it is construed as being either, appellant has no standing in this court. There is, however, no provision of Washington law which requires the filing or recordation of a consignment contract and the Washington court has held that, consequently, such filing or recordation would not afford constructive notice of its existence.

Its last decision is in *Flynn vs. Garford Motor Truck Co.,* (1928) 149 Wash. 264, 270; 270 Pac. 806, 808, where the court says:

> "This court has held that, in the absence of a statute authorizing the recording of an instrument of a certain character, the recording of such an instrument does not operate as constructive notice. *Howard vs. Shaw,* 10 Wash. 151, 38 Pac. 746; *Fischer vs. Woodruff,* 25 Wash. 67, 64 Pac. 923, 87 Am. St. Rep. 742; *Dial vs. Inland Logging Co.,* 52 Wash. 81, 100 Pac. 157."

DISCUSSION OF THE ELEMENTS OF A CONSIGNMENT.

This portion of the brief will be devoted to a very brief discussion of the elements of a consignment contract upon which no appellate court re-

quires any assistance; followed by a discussion of those elements which appellee may contend deprive the contract in the instant case of its character as a consignment agreement.

Discussion of the Contract as a Contract of Consignment.

The contract expressly reserves in the consignor title to the consigned merchandise and constitutes the merchant tailor as the agent of the consignor in the disposition of the property. That a contract of bailment may contain additional provisions which enlarge the legal responsibility of the bailee is well settled.

> "A bailee may, however, enlarge his legal responsibility by contract, express or fairly implied, and render himself liable for the loss or destruction of the goods committed to his care—the bailment or compensation to be received therefor being a sufficient consideration for such an undertaking."
>
> *Sturm vs. Boker,* (1893) 150 U. S. 312, 330; 37 L. Ed. 1093, 1100.

This consignment agreement is therefor valid unless destroyed as such by some added feature. The Learned Trial Court construed the tenth paragraph of the contract as constituting a sale. That paragraph, however, gave the tailor merely an option to cut up the merchandise into suits for sale

to a particular customer whose body the suit was made to fit.

In our opinion the Learned Trial Court committed error in failing to recognize that where the State law has created a rule of property, that that rule will be binding upon the Federal Courts. He failed to give effect to the law of Washington that the delivery of personal property with an option to purchase does not constitute a conditional sale contract. We most respectfully urge that he also failed to recognize that the same principle of law obtains in the Federal Courts.

We know of no dissent from the holding that a rule of property determined by State law is binding upon the Federal Courts.

> "Whether and to what extent a mortgage of this kind is valid is a local question, and the decision of the state court will be followed by this court in such case."
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> *Thompson vs. Fairbanks,* (1904) 196 U. S. 516, 522; 49 L. Ed. 577, 585, approved in
>
> *Humphrey vs. Tatman,* (1904) 198 U. S. 91, 92; 49 L. Ed. 956, 957.
>
> "The nature of transaction, that is to say, whether for instance, it amounts to a sale or bailment or pledge or mortgage or some other transfer of property, or whether sufficient delivery has been made to pass title, or whether

recording or filing of an instrument, be required, and, if so, as to whom it will be void for lack of recording, etc., is to be determined by the state law and the bankruptcy court will take it as so determined."

In re Tansill, (District Court, So. Carolina 1922) 17 Fed. (2) 413, 415.

Accord:

Dooley vs. Pease, (1900) 180 U. S. 126, 128; 45 L. Ed. 457, 459.

Etheridge vs. Sperry, (1890) 139 U. S. 266, 274, 277; 35 L. Ed. 171, 175, 176.

Union National Bank of Chicago vs. Bank of Kansas City, (1889) 136 U. S. 223, 235; 34 L. Ed. 341, 345.

Harkness vs. Russell, (1886) 118 U. S. 663, 678; 30 L. Ed. 285, 290.

Hervey vs. Rhode Island Locomotive Works, (1876) 93 U. S. 664, 671; 23 L. Ed. 1003, 1004.

In re Floyd & Hayes Estate, (4 C. C. A. 1916) 232 Fed. 119, 122.

Liquid Carbonic vs. Quick, (3 C. C. A. 1910) 182 Fed. 603, 607.

The law in Washington is plain that no conditional sale arises unless the receiver of property is under a legally enforceable obligation to purchase it. In this state the delivery of personal property with an option to purchase does not constitute a conditional sale.

Eilers Music House vs. Fairbanks, (1914) 80 Wash. 379, 380-1; 141 Pac. 885.

Eilers Music House vs. Archer, 81 Wash. 698; 142 Pac. 453.

Inland Finance Co. vs. Inland Motor Car Co., (1923) 125 Wash. 301, 304-5, 216 Pac. 14, 15.

Bank of California vs. Clear Lake Lumber Co., (1928) 146 Wash. 543, 556-7; 264 Pac. 705, 710.

Lahn & Simmons vs. Matzen Woolen Mills, (1928) 147 Wash. 560, 565; 266 Pac. 697, 699.

In *Lahn & Simmons vs. Matzen Woolen Mills, supra,* the Supreme Court of Washington approved the language in *Eilers Music House vs. Fairbanks, supra,* as follows:

> "A contract of conditional sale contemplates the relation of vendor and vendee. In *Eilers Music House vs. Fairbanks,* 80 Wash. 379, 141 Pac. 885, it is said: 'The whole tenor of the instrument shows that the goods were to be consigned for sale upon commission, and that there was no conditional sale, because the contract does not create the relation of vendor and vendee.' "

In *Bank of California vs. Clear Lake Lumber Company, supra,* the Great Northern Railroad Company had leased personal property to a lumber company for five years, giving the lumber company a written option to purchase the property. A contest

developed between the creditors of the lumber company, which became insolvent, and the Great Northern Railroad Company, the receiver for the lumber company claiming that the transaction constituted a conditional sale contract and was void as against creditors for want of recordation. The Washington court say:

> "But this, it appears to us, is nothing but an option granted to the lessee, which he may or may not exercise as he sees fit. Certainly it cannot be claimed that, under this agreement, the lessor could have waived his right to retake the property and sue for the purchase price. A vendor in a conditional sale contract has a choice of remedies. He may disaffirm the sale by retaking the property, or he may affirm it by suing to recover the balance of the purchase price. (Citations.) We conclude, therefore, that this is but a lease with option to purchase, and that the Great Northern Railway Company is entitled to recover from the receiver all of the rails. * * *."

Even more pertinent is the language of the Supreme Court of Washington in *Inland Finance Co. vs. Inland Motor Car Co., supra.*

> "* * * To constitute a conditional sale there must be a contract between the parties by which the one party agrees to sell and the other party agrees to buy. This is not only the general understanding of such a transaction, but it is the transaction the statute regulates. The wording of the statute is (Remington's Comp. Stat. Sec. 3790):

'That all conditional sales of personal property, or leases thereof, containing a conditional right to purchase, where the property is placed in the possession of the vendee, shall be absolute * * * unless * * * a memorandum of such sale, stating its terms and conditions * * * shall be filed. * * *.'

These words plainly imply an agreement to sell on the one part and to buy on the other, and just as plainly imply that without such an agreement there is no conditional sale."

The same rule has been announced by this court and so far as we can find is uniformly recognized in the other Federal Courts.

In re Renfro-Wadenstein, (9 C. C. A. 1931) 53 Fed. (2) 834, 836-7.

McKey vs. Clark (*In re Tomlinson-Humes, Inc.*), (9 C. C. A. 1916) 233 Fed. 928, 933.

In re Otto-Johnson Mercantile Co., (District Court, New Mexico, 1928) 52 Fed. (2) 678, 680.

Walter A. Wood Mowing & R. Machine Co. vs. Van Story, (4 C. C. A. 1909) 171 Fed. 375, 378, 380-381.

In re Pierce, (8 C. C. A. 1907) 157 Fed. 757, 758.

Mitchell Wagon Co. vs. Poole, (6 C. C. A. 1916) 235 Fed. 817, 820.

In *McKey vs. Clark, supra,* this court say:

"What Myers did, however, was to give to Tomlinson-Humes (the bankrupt) an option

> or right to buy the pictures upon payment of certain sums of money, and he turned the possession of the pictures over to the optionee in order that it might better effect a sale. * * * It must be very generally true that the market for highly valuable paintings is very limited, and dealers in turn must be comparatively few in number; and it might well be that a dealer, not having the means to buy outright, would obtain from the owner an option, and, to help bring about sale, that the owner might intrust his pictures to the holder of the option, so that holder could exhibit them at its established place of sale and thus be in a better position to deal with purchasers and deliver readily in the event a buyer is found. But, in the case before us, until the option was determined, no title passed from Myers, the owner, to Tomlinson-Humes, and in the absence of clear evidence to the contrary, it is not to be presumed that the owner intended that title should pass until the purchase price was paid."

The court thereupon held (p. 936) that the bankrupt had "no interest in the pictures to which a judgment lien could have attached, or which passed to the creditors when bankruptcy came."

In the *Renfro-Wadenstein* case, *supra,* this court (p. 836) set out the provision of the contract which provided that

> "In case of such termination party of the first part (the consignor) shall have the right, at its option, to require party of the second part (bailee) to keep and pay for the consigned

goods then remaining on hand at the invoiced price thereof. * * *."

This court then discusses the above authorities with an extensive quotation from *In re Galt,* recites the elements of a conditional sale contract (p. 837) as outlined in the Washington decisions previously quoted and upheld the contract as a consignment agreement.

In *Otto-Johnson Mercantile Co., supra,* it is said:

> "I think the true relation between the Acceptance Corporation and the Mercantile Company was that of bailor and bailee with an option in the bailee, the Mercantile Company, to purchase the automobiles upon payment of the price fixed in the schedule, as a special method of securing the advances made by the former to the latter. (Citations.) An option to purchase in the holder of a chattel will not destroy his character as bailee. (Citation.)"

The Fourth Circuit Court of Appeals in *Walter A. Wood Mowing & R. Machine Co. vs. Van Story, supra,* say (pp. 380-381):

> "The fact that the bankrupt was given an option to purchase a portion of this property did not change the nature of the contract, by virtue of which the property was stored with the bankrupt as hereinbefore stated; it having no more right to the property by virtue of its being in its possession than it would have had,

had the property been in the hands of petitioner or some other party, inasmuch as it was clearly the intention of the parties that the petitioner was to retain title to the property. Even if the bankrupt had an option to purchase the entire lot of machinery deposited with it under the circumstances, with the conditions attached as in this instance, the granting of the option on the part of the petitioner could not have the effect of converting the bailment into a sale, nor could it vest the bankrupt with the title to the property."

And at page 378 the court used this language:

"The bankrupt had a right to sell any machines any time it saw fit to its own customer upon its own terms and use the proceeds as its own without reporting the sale or either remitting the proceeds to the petitioner. There is not evidence that it was allowed any commission upon such sale. It was not required to account for such machines so sold until the time of the annual settlement."

From *Mitchell Wagon Company vs. Poole, supra,* we quote as follows (p. 820):

"The contract here provided for the bankrupt becoming purchaser in several contingencies. One was when he sold the wagons. This follows from the fact that he had a right to sell on such terms as to price and time of payment as he liked, but was bound, if he sold, to pay appellant for them at a fixed price and a fixed time, and the proceeds of the sale were to be his. A sale by him was, in effect, a purchase and a re-sale."

The Eighth Circuit Court of Appeals in *Re Pierce, supra,* adjudicated a contest between a bailor and a trustee in bankruptcy. The bailment provided that if the bankrupt failed to sell the implements received, he should either purchase and pay for them at prices fixed or hold them subject to the order of the bailor. The court say (p. 758):

> "The contract under which the property in controversy was delivered by the Deere & Webber Co. to the bankrupt was one of bailment for sale. The title remained in the petitioner."

We have heretofore been dealing with cases like the instant case in which the bailee has an option to buy. More strongly in favor of appellant is the line of decisions in the Federal Courts that the bailor may hold as against a trustee in bankruptcy personal property which had been delivered by the bailor into the possession of the bankrupt with an option reserved in the bailor to *compel* the bailee to purchase it. To this effect are:

In Re Galt, (7 C. C. A. 1903) 120 Fed 64, 69.

In Re Harris & Bacherig (District Court, M. D. Tenn. 1913) 214 Fed. 482, 483.

McCallum vs. Bray-Robinson Clothing Co., (6 C. C. A. 1928) 24 Fed. (2) 35, 37-38.

In Re Klein, (2 C. C. A. 1924) 3 Fed. (2) 375.

We quote from *In Re Galt, supra,* as follows:

"It is claimed that the agreement is a conditional sale, within the doctrine of *Chickering vs. Bastress* (Cit.) * * *. But in each of those cases the party receiving the goods gave to the other his notes, evidencing a contract to pay absolutely; the proceeds of the sales to be applied upon the notes. The case is like to that of *Lenz vs. Harrison,* 148 Ill. 598, 36 N. E. 567, where an agreement similar to the one in hand was held to be a bailment, and not a sale. The clause in the contract giving an option to the company to require Galt to give his note, or to pay in cash, or to store, subject to the order of the company, the goods not sold within twelve months, is probably the strongest clause in the contract to indicate a sale; but, as suggested by the Supreme Court of Illinois in *Lenz vs. Harrison, supra,* while it might have such force considered alone, taking it with the whole contract, it was seemingly incorporated to compel the agent promptly to sell, and report sales within the time stated. The cases in Illinois are carefully distinguished in *Manufacturing Co. vs. Lyons, supra,* and fully sustain our holding that the contract in question constitutes a bailment, and not a sale. Such construction accords with the decisions elsewhere upon like contracts."

In *In Re Harris & Bacherig, supra,* District Judge, and later Mr. Justice, Sanford said (p. 483):

"The trustee insists that the option given the consignors, on default by the consignees, to either retake the unsold goods or to require the consignees to pay for the same, necessarily had the effect of making the transaction a sale rather than a bailment.

* * * * * * * *

In other words, as I construe the contract, it is essentially and primarily a consignment contract providing for the return of the unsold goods, with an option, however, given to the consignors to turn it into a contract of sale upon the happening of certain conditions. This option, however, was never exercised by the consignors."

The court then reviews the Federal authorities and adds (p. 485):

"In other words, these cases proceed upon the principle that where the title is vested, subject to defeasance by right of return in the purchaser, this is a conditional sale vesting title at once; but, where the property is merely delivered with a right in the bailee to subsequently purchase, the title is not vested until this option is exercised. So, * * * I am constrained to conclude, * * * that where, as in the present case, the consignment contract expressly reserves title in the consignor, with the right to demand the return of unsold goods, and merely gives him an option, upon the happening of certain conditions, to change the contract into one of sale as to the unsold goods, the contract remains until this option is exercised by the consignor one of consignment merely and not of sale."

The foregoing decision is cited in *McCallum vs. Bray-Robinson Clothing Co., supra,* as a basis for the following statement (pp. 37-38):

"But, even if the paragraph in question were construed as giving appellee an option to

> require bankrupt to purchase the goods not sold at the end of the regular selling season, such provision alone would not convert the consignment contract into one of sale."

The quotation to the same effect in *In Re Klein*, *supra,* is too long to be set out here.

In crescendo we next call attention to the holding by the Circuit Court of Appeals for both the Eighth and Sixth Circuits, that even a provision in the consignment agreement that upon the happening of a certain contingency the consignee *must* purchase the goods does not change the contract from a contract of consignment into a conditional sale.

> *Mitchell Wagon Co. vs. Poole,* (6 C. C. A. 1916) 235 Fed. 817, 820-824.
>
> *Franklin vs. Stoughton Wagon Co.,* (8 C. C. A. 1909) 168 Fed. 857, 860.

Our contract (R. 14-16) contains no obligation by the bankrupt to buy any suit pattern nor to sell one. Both parties to the agreement knew and intended that in the normal course of business the bankrupt would solicit individual customers to purchase custom made suits, the foundation of which suits would be the woolens of appellant. Both parties knew that no suit pattern would be deliberately cut until the tailor had a customer who had contracted to buy a suit made from that particular pattern.

The cutting of the cloth into 22 or 23 pieces (R. 90) was not an end in itself. The end was the sale of a suit to a particular customer whose body alone it would fit. The tailor was not making a suit for himself, nor was he making it for the use of appellant. The process of manufacture was a mere transition period. The gist of the transaction was the delivery of the garment to the purchaser, at which moment title passed to the purchaser freed from any claim of appellant as between it and the purchaser. Concerning manufacture of the garment, the language of the tenth paragraph is:

> "The party of the second part shall have the right * * * to make up * * * said merchandise into garments, but in such case the title to all such garments shall remain in the party of the first part."

In *Borman vs. U. S.* (2 C. C. A. 1919) 262 Fed. 26, *supra,* which the Learned Trial Court cites as authority for his holding that the title to the suit passed to the bankrupt, we most respectfully urge that the Second Circuit Court of Appeals in that case decided exactly to the contrary because they say (p. 29):

> "Moreover, it was provided, as we have seen, that 'all rags and clippings from the linings "shall remain" the property of the United

> States'; that is to say, the title in the rags and clippings must under this language have been all the time in the United States. If the title to the linings had passed out of the United States at the time of their delivery to the contractor, the title to so much of the linings as subsequently became rags and clippings originally passed along with the rest, and it could not properly have been said that as to them the title should continue or 'remain' in the United States. Some other language would have been necessary to indicate that the United States was to be reinvested with the title which it lost when the linings were delivered. Assuming, then, a sale, it is clear that the title could not have been intended to pass until the linings were cut out, and then only as to so much as were used in the jerkins."

In other words, in the *Borman* case, the title to the linings was to "remain" in the United States and the title to the portion of the goods which was used in making the jerkins is thereupon construed to pass to the contractor. In the instant case the tenth paragraph of the contract provided that the title to the garment was to "remain" in appellant. This record shows that as minute pieces of cloth what was left was valueless (R. 90-91). If, therefore, effect is given to the terms of the contract in the instant case as it was in the *Borman* case, the conclusion is irresistible that the title to the manufactured garment was still in appellant. When, therefore, such garment was delivered to the pur-

chaser, then as between appellant and the bankrupt the sale was a sale of the garment of appellant; the proceeds therefor as a matter of law became the property of appellant except (as provided in the tenth paragraph), that the bankrupt should "receive and retain for their services and expenses in making up such garments such part of the selling price as shall exceed the sale price of the consigned merchandise used therein."

At the risk of prolixity, we repeat: The Learned Trial Court decided as a matter of law that the method of doing business outlined by the tenth paragraph of the contract in question constituted a sale irrespective of the language therein, that the title to the manufactured garment "shall remain in the party of the first part," and irrespective of a similar provision in the preceding paragraph (R. 16) which also reserves title in the woolens in appellant. It is our contention that the question is not one of law, but one of intention of the parties as decided in *United States vs. Borman, supra.* We regard *Laflin & Rand Powder Co. vs. Burkhardt,* (1878) 7 Otto, (97 U. S.) 110, 24 L. Ed. 973, as an authority to the same effect. In that case a manufacturer of powder under his own patented process had a written contract with the plaintiff whereby the plaintiff should

furnish him materials for making powder, and money wherewith to buy other materials for the same purpose. The inventor, Dittmar, was to manufacture the powder and consign it to the plaintiff for sale, the net profits to be divided equally between the parties. One of Dittmar's creditors seized and sold on execution materials which had been furnished by plaintiff company under the contract. The question before the United States Supreme Court was whether the title to the materials which plaintiff furnished to Dittmar for the purpose of being manufactured into explosives under the terms of the contract remained in the plaintiff or passed to Dittmar and were thus liable for sale upon execution by the creditor of Dittmar. So that the question was squarely raised (but not decided in this language), whether the court should decide as a matter of law (as the Learned Trial Court did in this case), that the title to materials furnished for the purpose of manufacture passed to the one in whose possession they were found, or whether the question was one of intention of the parties to be determined from the language which they used. The United States Supreme Court did not decide the *Laflin case* as a matter of law, but did examine the language of the contract to determine what was the *intention* of the par-

ties as to the passing of title. In construing the contract the United States Supreme Court say: (7 Otto (110 U. S.) 118, 24 L. Ed. 973, 974):

> "The 'advances and the cost of the raw material are to be charged to the said party of the first part, against the manufactured goods to be consigned to the party of the second part' * * * These expressions are strongly indicative of the *intention* to make Dittmar a debtor for the moneys and materials furnished to him under the contract." (Italics ours.)

In *Hatch vs. Standard Oil Company* (1879), 10 Otto, (100 U. S.) 124, 131, 134, 25 L. Ed. 554, 556, 557, the question was whether title had passed to the property. The court say (p. 131):

> "* * * It is ordinarily correct to say, that, whenever a controversy arises in such a case as to the true character of the agreement, the question is rather one of intention than of strict law; the general rule being that the agreement is just what the parties intended to make it, if the intent can be collected from the language employed, the subject matter, and the attendant circumstances. ....
>
> * * * * * * *
>
> (P. 134):
>
> " 'There is no rule of law,' says Blackburn, J., in the case last cited, 'to prevent the parties in such cases from making whatever bargain they please. If they use words in the contract showing that they intend that the goods shall be shipped by the person who is to supply the same,

> on the terms that when shipped they shall be the consignee's property and at his risk, so that the vendor shall be paid for them whether delivered at the port of destination or not, this intention is effectual.' "

We do not understand why the parties to a consignment may not use apt language to accomplish the same purpose and we most respectfully contend that *United States vs. Borman, supra,* and *Laflin & Rand Powder Co. vs. Burkhardt, supra,* are authority that they can.

Here are two business concerns conducting a legitimate business. They deem it to the interests of both of them that goods of one shall be committed to another; that the title to those goods shall remain in the one; that the other shall have the right to combine such goods with goods of his own; that the title to the manufactured article shall remain in the one and that the other shall be empowered to transfer the title of the one to a third party. The Learned Trial Court does not find that the tendency of such an arrangement is fraudulent. There is therefore no rule of morals why the contract should not be enforced as it reads and we most respectfully urge upon this court that where parties engage in a legitimate business undertaking and by a contract which is not susceptible of construction fix their legal rela-

tions, the highest rule of public policy requires that such contract be enforced. For the foregoing reasons we respectfully urge that the contract in question is not a contract of conditional sale, but is a legitimate consignment agreement.

If Your Honors shall sustain our position in the foregoing discussion, then the decree of the Learned Trial Court should be reversed in so far as it requires us to pay for the suitings which we took back just prior to bankruptcy and in so far as it requires us to pay the $227.23 which we collected from the assigned accounts and which latter sum is the value of appellant's consigned merchandise in the accounts which the bankrupt assigned to appellant just prior to bankruptcy, and in so far as it requires us to reassign to the trustee the three uncollected accounts which we still have.

If Your Honors shall hold that the tenth paragraph of the contract (p. 16) constituted an option by the bankrupt to purchase our merchandise, we still contend that the Learned Trial Court should be reversed as to the merchandise which we re-took, but in that event we would not be entitled to hold said $227.23, nor the three accounts. Of course, if Your Honors hold with the Learned Trial Court that the transaction was a sale and not a bailment the

decree should be affirmed.

It now remains only to discuss the criticisms by appellee of the terms of the contract (R. 14-16) and of the conduct of appellant which appellee contends are fatal to the defense of appellant in this case.

One contention of appellee is that subsequent creditors of the bankrupt existed who were ignorant of the assignment. The Learned Trial Court properly so found. (R. 33, 34). Appellant contends that its exception to this finding (R. 34) must be sustained because:

(a) The court did not find that appellant had actively participated in any fraud upon subsequent creditors;

(b) The court did not find that either appellant or the bankrupt had attempted to conceal the existence of the consignment contract;

(c) The court did not find that any creditor had been misled by the consignment contract.

We will consider first the rule in the state of Washington and then that adopted by the Federal courts.

WASHINGTON RULE

Eilers Music House vs. Fairbanks, (1914) 80

Wash. 379, 383; 141 Pac. 885, 886.

Lloyd vs. McCallum Donohoe Co., (1923) 127 Wash. 180, 185-186; 219 Pac. 849, 851.

Bauer vs. Commercial Credit Co., (1931) 163 Wash. 210, 216; 300 Pac. 1049, 1051.

In *Eilers Music House vs. Fairbanks, supra,* a creditor of a factor had received from the factor consigned goods in satisfaction of a debt—which is what the trustee in bankruptcy is seeking to do in the instant case. The Washington court quoted with approval from two other authorities from which the following are excerpts (p. 382):

> "Whenever the factor has bartered or disposed of goods in a manner not within the ordinary and accustomed modes of transacting the like business, the principal may follow and reclaim the property, and in such case *it is wholly immaterial whether the person dealing with the factor knew him to be such or not.*" (Italics ours.)
>
> "* * * But if the principal has by any act of his own induced a third person to believe he has given the factor authority to dispose of the goods the principal cannot reclaim them. The principal may recover goods or the proceeds of a consignment of a person to whom they were turned over in the payment of an antecedent debt due from the factor. If goods are wrongfully taken from the possession of a factor by an officer the owner may recover them back."

In *Bauer vs. Commercial Credit Co., supra,* the Washington Supreme Court say:

"* * * We are also mindful of, and still adhere to, the rule stated as follows in *Lloyd vs. McCallum Donohoe Co.,* 127 Wash. 180, 219 Pac. 849. * * *: 'It is a common thing for an owner of property to place it in the hands of a broker or factor for sale, and, in so far as we are advised, no court has yet held that he thereby subjects his property to the debts of the broker or factor. On the contrary, we have held that he does not.' *Eilers Music House vs. Fairbanks,* 80 Wash. 379, 141 Pac. 885."

Rule in the Federal Courts

Taylor vs. Fram, (2 C. C. A. 1918) 252 Fed. 465, 469.

McCallum vs. Bray-Robinson Clothing Co., (6 C. C. A. 1928) 24 Fed. (2) 35, 37.

In Re Klein, (2 C. C. A. 1924) 3 Fed. (2) 375, 379.

We quote from *Taylor vs. Fram, supra:*

"The District Judge in his opinion attached importance to the fact that the bankrupt did not advertise himself as an agent, nor have any sign to show that he was selling goods on consignment. We know of no rule of law which makes it incumbent upon one who receives goods upon consignment to sell that he should advertise the fact of his agency to his customers; and we do not attach any importance to the nondisclosure by the bankrupt that he received the goods in his capacity as an agent."

From *McCallum vs. Bray-Robinson Clothing Co., supra,* we quote as follows:

> "The fact that the consigned goods were kept in the store not separate and apart from other goods, and that the public could not distinguish the one from the other, is not important, in the absence of fraud or of proof that any creditor extended credit to bankrupt upon reliance of title to those goods in the bankrupt."

The Second Circuit Court of Appeals *In Re Klein, supra,* say:

> "The petitioners owed no duty to other creditors to give notice that the consigned goods were not the bankrupt's own property."

The United States Supreme Court and this court in line with many others raise an estoppel against a consignor only by his active participation in a fraud committed by the consignee upon creditors.

Greey vs. Dockendorff, (1913) 231 U. S. 513, 516; 58 L. Ed. 339, 343.

Ludvigh vs. American Woolen Co., (1913) 231 U. S. 522, 529; 58 L. Ed. 345, 350.

In Re King, (9 C. C. A. 1920) 262 Fed. 318, 321.

In Re Taylor, (District Court, E. D. Mich. 1931) 46 Fed. (2) 326, 328, 329.

In Re Weisl, (District Court, S. D. New York 1924) 300 Fed. 635, 639, 640, 642.

In *Greey vs. Dockendorff, supra,* Mr. Justice

Holmes, speaking for the United States Supreme Court, said:

> "It is objected that this lien was secret. But notice to the debtors was not necessary to the validity of the assignment as against creditors, (Citation) and merely keeping silence to the latter, whether known or unknown, created no estoppel. (Citations.) There was no active concealment and no attempt to mislead anyone interested to know the truth."

In *Ludvigh vs. American Woolen Co., supra,* in the course of its opinion the court say:

> "It is urged that the goods were not kept separately, but it appears that the tags of the Woolen Company were left upon the goods, and it is not shown that any creditor relied upon mis-marking or misbranding."

The validity of two consignments was upheld by this court in the case of *In Re King, supra.* In sustaining one of the two consignments as against a charge of fraud, this court so sustained the consignment upon the ground that the transaction was

> "* * * unattended * * * by any positive act of the consignor that can be properly held to have enabled the consignee to commit any fraud upon the public."

The following quotations from *In Re Weisl, supra,* are apt:

(p. 639) "The law might, of course, make goods liable to the debts of any bailee to whom the owner entrusted them. The possibility of raising a fictitious credit by such means undoubtedly exists, and with it of harm to creditors. Yet this has never been so, and it would obviously destroy the basis upon which enormous transactions take place daily. In a sense there seems little difference between selling goods with a purchase-money mortgage, and leaving them in a factor's possession to sell. But, wisely or not, an owner may safely do as much if he do not aid the factor in falsely representing the goods as his. The line is drawn at the passage of title, and the owner does not begin to lose any of his rights until he becomes privy to some deceit by the factor. *Miller Rubber Co. vs. Citizens Co.* (C. C. A. 9) 233 Fed. 488, 147 C. C. A. 374, was a case where the contract was held to be a fraudulent cover for a sale, because the factor was allowed to mix the goods with his own, and because the principal gave him stationery by which he might represent them as his own. These circumstances were thought enough in the case of automobile tires to make the contract fraudulent."

* * * * *

(p.640) "Further, it is urged that Dudley sold the goods in his own name. So they did, and so Seacoast doubtless knew that they did. If a question had arisen as to Dudley's power to sell, no doubt these circumstances might have been relevant in favor of the buyer; but it is impossible to see how they can be relevant as respects creditors. If a factor sells his principal's goods, in his own name, with his principal's knowledge it is no fraud upon his cred-

itors for the principal to re-claim such of the goods as the factor has not sold.

"The representation cannot go further than the goods in respect of which it is made, which by hypothesis are sold at the time of the representation. The principal's implied consent involves no representations to creditors of the character of the factor's interest in other goods."

* * * * *

(p. 642) "I know of no rule by which, on pain of sharing in his guilt, one must uncloak a wrongdoer merely because he is one's debtor, even one's insolvent debtor. To establish such a relation, the accomplice must either take an active part by advice or persuasion, or he must be under a positive duty to act, or it must be shown that the wrong was done on his behalf, and that he later accepted some share of the proceeds."

A consignment contract was upheld in *In Re Taylor, supra,* where, (p. 328) "This merchandise was added to other stock in the retail store of the bankrupt and there displayed and sold by him to his customers in the regular course of trade and without any identification or representation relative to the ownership thereof." The District Court said (p. 329):

"In the absence, as here, of any indication of actual fraud or bad faith of either of the parties towards creditors, or of the reliance by any such creditors upon the apparent ownership by the bankrupt permitted by the

petitioner, there is no basis for the claim of estoppel urged by the trustee. *In Re Klein,* 3 Fed. (2) 375, (C. C. A. 2nd); *McCallum vs. Bray-Robinson Clothing Co.,* 24 Fed. (2) 35, 37. (C. C. A. 6th). As was said by the Circuit Court of Appeals in the Sixth Circuit in the case last cited: 'The fact that the consigned goods were kept in the store not separate and apart from other goods and that the public could not distinguish the one from the other, is not important, in the absence of fraud or of proof that any creditor extended credit to bankrupt upon reliance of title to those goods in the bankrupt."

ALLEGED FAILURE TO CARRY OUT THE TERMS OF THE CONSIGNMENT.

No estoppel against the consignor arises on account of the failure to carry out the exact terms of the consignment unless creditors were misled.

Ludvigh vs. American Woolen Co., (1913) 231 U. S. 522, 529; 58 L. Ed. 345, 350.

McElwain-Barton Shoe Co. vs. Bassett, (8 C. C. A. 1916) 231 Fed. 889, 893.

We have already quoted from the *Ludvigh* case, *supra,* (ante p. 55) where the woolens merely had tags of the Woolen Company upon them and were not kept separate from the other goods of the bankrupt. The United States Supreme Court upheld the consignment contract upon the ground that

"It is not shown that any creditor relied upon mis-marking or mis-branding."

To the same effect:

McElwain-Barton Shoe Co. vs. Bassett, supra, where the course of dealing between the parties on a consignment agreement (which the court held valid) varied from that set out in the contract. The Eighth Circuit Court of Appeals say (p. 892):

> "There is no evidence in the record that any creditor of Adkins was misled in any way by the course of dealings between appellant and Adkins."

Variations from the consignment agreement have been held not to invalidate it in the following cases:

General Electric Co. vs. Brower, (9 C. C. A. 1915) 221 Fed. 597, 601.

McCallum vs. Bray-Robinson Clothing Co., (6 C. C. A. 1928) 24 Fed. (2) 35, 37.

McElwain Barton Shoe Co. vs. Bassett, (8 C. C. A. 1916) 231 Fed. 889, 891, 892.

Bransford vs. Regal Shoe Co., (5 C. C. A. 1916) 237 Fed. 67, 68, 69.

In Re King (9 C. C. A. 1920) 262 Fed. 318, 321.

In *General Electric Co. vs. Brower, supra,* it was stipulated that a consignee of lamps for sale did not keep them separate and apart from other stock of the bankrupt except that they were kept

together on shelves in one place and in boxes marked, "Banner Electric Co." (p. 600.) The District Court held that that consignment contract was void. This court in reversing him said (p. 600):

"Gilbert, Circuit Judge:

'It is the contention of appellee that where goods are delivered by a manufacturer to a seller, and the latter is allowed to place them with his stock of goods, and sell and dispose of them in the ordinary course of business, to manage and control them as other goods, and where he pays all the taxes, cartage, storehouse charges, and all other expenses in connection therewith, and agrees to pay for such goods so disposed of, and there is neither an agreement to return the goods nor an agreement to account for the proceeds of the sale of goods as such, there is no bailment. To sustain that contention, the case particularly relied upon is *In Re Penny & Anderson,* (D. C.) 176 Fed. 141. That was a case in which the claimants had delivered to the bankrupts, who were conducting a restaurant, a stock of wines and liquors under an agreement called a "memorandum of consignment," which contained an invoice of the liquors and prices thereof, and provided that they should be considered as delivered on consignment, and should remain the property of the claimants until the full indebtedness of the bankrupt should be paid. There was no restriction in the sale of the liquors by the bankrupts, as to price or otherwise, and no provision respecting the disposition of the proceeds. It was held that the transaction was not a consignment but a sale; the court ruling that the

transaction did not create the relation of principal and factor. That conclusion was based upon the fact that the invoice accompanying the goods contained the words, "sold to Messrs. Penny & Anderson, terms on consignment," and gave the price of each article of consignment, and the fact that the debtors were permitted to sell and dispose of the goods as they saw fit, and at any price and terms, for consumption on the premises as required in their business, and that the agreement was silent as to the disposition of the proceeds, and recognized only an indebtedness to be paid before the title vested in the consignees.

Substantially different is the contract in the case at bar. (The court then discusses the elements of a consignment contract in the agreement.) These provisions, so far as they go, all clearly and unequivocally mark the contract as a contract strictly of agency.

We will briefly consider the provisions therein that are said to indicate a contrary intention. Those provisions are the agent's assumption of liability for loss, and for the payment of certain expenses, and for insurance. Such provisions do not change a contract of agency into a contract of sale. Nor was the contract rendered a contract of sale by reason of the fact that it contained no provision that the agent should keep the money separate and apart from its other moneys, or that it should turn over the money received from the sale to the manufacturer, but instead was to pay for the lamps sold each month, less 29%, for making the sales. *Eilers Music House vs. Fairbanks,* (Wash.) 141 Pac. 885. In *Sturm vs. Boker,* 150 U. S. 312, 14 S. Crt. 99, 37 L. Ed. 1093,

the court said: "A bailee may, however, enlarge his legal liabilities by contract, express or fairly implied, and render himself liable for the loss or destruction of goods committed to his care; the bailment or compensation to be received therefor being a sufficient consideration for such undertaking."

In Re Flanders, 134 Fed. 560, 67 C. C. A. 484, the court said:

"The objections that ordinary invoices accompanied the shipments, that such shipments were made direct to Flanders, that the latter was sold by him in his own name, that he allowed credit upon sales, that he guaranteed sales, and that he insured in his own name, do not change the nature of the transaction."

In Re Columbus Buggy Co., 143 Fed. 859, 74 C. C. A. 611, it was held that a contract between a furnisher of goods and the receiver, that the latter may sell, and at such prices as he chooses, that he will account and pay for the goods sold at agreed prices, that he will pay the expense of insurance, freight, storage and handling, and that he will hold the merchandise unsold subject to the order of the furnisher, discloses only an agreement of bailment for sale, and does not evidence a conditional sale.

In *John Deere Plow Co. vs. McDavid,* 137 Fed. 802, 70 C. C. A. 422, the court gave similar construction to a contract containing like provisions.

Of similar import are *In Re Pierce,* 157 Fed. 757, 85 C. C. A. 14, and *Franklin vs.*

Stoughton Wagon Co., 168 Fed. 857, 94 C. C. A. 269.' "

In *McCallum vs. Bray-Robinson Clothing Co., supra,* the consignor sent goods to the bankrupt, together with a consignment contract about February 1, 1925. The contract was not signed until August 20, 1925.

> "The bankrupt made settlements for the goods shipped on consignment at somewhat irregular intervals, generally at the end of each week. * * * Fire insurance policies on the consigned goods were issued in the name of the bankrupt, which action was acquiesced in by the claimant."

In a note on page 37 it is stated that the bankrupt also made some remittances at an "average" price, but consignor insisted upon remittances according to the contract and that:

> "These two instances do not affect the nature of the contract relation as one of consignment, nor its good faith. *McElwain Barton vs. Bassett, supra,* at page 893; *General Electric Co. vs. Brower,* (C. C. A. 9) 221 Fed. 597, 601, 602."

In *Bransford vs. Regal Shoe Company, supra,* the Fifth Circuit Court of Appeals affirmed the decision of the District Court which established the validity of a consignment with the terms of which

the parties had observed and complied "in so far as the exigencies of trade permitted." (p. 69.)

In *In Re King, supra,* this court held valid a consignment under the following circumstances: (p. 321.)

> "No account of sales was made by King, nor sent to the Empire Company. Shortages in the stock of tires on hand at his shop were filled regularly by the Empire Company after the monthly inventory of stock; such replenishments being made without any order from King."

The report of the case does not disclose whether the tires were or were not kept separate in his place of business, but the case does disclose that the stock of tires delivered under the other consignment which was held valid in the same case were kept separate and apart from other tires. (p. 321.) We assume therefore that the Empire tires were not, but that such failure was not regarded by this court as fatal to the consignment contract.

The contention of the trustee that where the alleged consignee may sell at any price he likes, being bound to pay for the goods at a fixed price, the transaction is a sale and not a bailment, is refuted in the following imposing array of cases:

Sturm vs. Boker, (1893) 150 U. S. 312, 315, 317, 330; 37 L. Ed. 1093, 1096, 1097, 1100.

Ludvigh vs. American Woolen Co., (1913) 231 U. S. 522, 524; 58 L. Ed. 345, 348.

In Re Renfro-Wadenstein, (9 C. C. A. 1931) 53 Fed. (2) 834, 835, 836; affirming 47 Fed. (2) 238, 244.

Walter A. Wood Mowing & R. Machine Co. vs. Van Story, (4 C. C. A. 1909) 171 Fed. 375, 378, 379.

McCallum vs. Bray-Robinson Clothing Co., (6 C. C. A. 1928) 24 Fed. (2) 35, 37.

In Re Galt, (7 C. C. A. 1903) 120 Fed. 64, 66.

In Re Sachs, (District Court, Md. 1929) 31 Fed. (2) 799-800.

Bartling Tire Co. vs. Coxe, (5 C. C. A. 1923) 288 Fed. 314, 315, 316.

In Re National Home & Hotel Supply Co., (District Court, E. D. Mich., 1915) 226 Fed. 840, 842, 843, 846-847.

McElwain-Barton Shoe Co. vs. Bassett, (8 C. C. A. 1916) 231 Fed. 889, 891.

Mitchell Wagon Co. vs. Poole, (6 C. C. A. 1916) 235 Fed. 817, 820.

Franklin vs. Stoughton Wagon Co., (8 C. C. A. 1909) 168 Fed. 857, 859, 860.

John Deere Plow Company vs. McDavid, (8 C. C. A. 1905) 137 Fed. 802, 808-809.

Century Throwing Co. vs. Muller, (3 C. C. A. 1912) 197 Fed. 252, 263.

In Re Pierce, (8 C. C. A. 1907) 157 Fed. 757.

Rockmore vs. American Hatters & Furriers, Inc., (2 C. C. A. 1926) 15 Fed. (2) 272.

In Re Klein & Caplin vs. Clark, (2 C. C. A. 1924) 3 Fed. (2) 375.

Brown Bros. & Co. vs. Billington, (Pa. 1894) 163 Pa. St. 76; 43 Am. St. Rep. 780, 783.

To establish our contention that the permission of the bankrupt to sell at his own price and retain the proceeds above the consignment price does not destroy the bailment it should be sufficient to discuss merely the authorities from the United States Supreme Court and from this court.

In *Sturm vs. Boker, supra,* the agreement was held to be a consignment where the consignor wrote the consignee that the latter was to ship the goods to Mexico "to be sold there by you to the best advantage." The court (150 U. S. at 330-331; 37 L. Ed. at 1100) construed the contract as follows:

> "He (consignee) assumed the expenses of transporting the goods to Mexico, the duty of selling them to the best advantage after they reached there, the obligation to account to the defendants for the price at which they might be sold, less one-half of the profits in excess of the invoice price, and if not sold, he was to return the specific articles to the defendants free of expense."

On the loss of the goods the court held that title was in the consignor and that the loss was his loss.

In *Ludvigh vs. American Woolen Co., supra,* the fourth paragraph of a contract, which the United States Supreme Court held to be one of consignment, provided (231 U. S. 524; 58 L. Ed. 348):

> "Said party of the second part (consignee) agrees to sell such merchandise to such persons as they shall judge to be of good credit * * * and to collect for and on behalf of party of the first part all bills and accounts for the merchandise so sold, and to immediately pay over to the said party of the first part any amount collected as aforesaid, * * * minus, however, the difference between the price at which said merchandise so collected for has been invoiced to the party of the second part, and the price at which said merchandise has been sold as aforesaid by the party of the second part."

In *In Re Renfro-Wadenstein, supra,* the District Court held: (47 Fed. (2) 244.)

> "The mere fact that the contract provides that the bankrupt may fix the selling price at not less than invoice and to keep commissions, covering insurance, storage, and expense of keeping, does not constitute a sale if there is no obligation of the bankrupt to buy. (Citations.)"

In the affirmance of the *Renfro-Wadenstein* case, *supra,* by this court, 53 Fed. (2) 834, that question is not raised.

Another contention of the appellee is that the failure to require the proceeds of sales to be held or the failure to hold the same as trust funds destroys the agency relationship between the owner and the possessor of chattels. The existence of any such principle of law is denied in the following cases:

Eilers Music House vs. Fairbanks, (1914) 80 Wash. 379, 380; 141 Pac. 885.

General Electric Co. vs. Brower, (9 C. C. A. 1915) 221 Fed. 597, 601.

In Re King, (9 C. C. A. 1920) 262 Fed. 318, 321.

In Re Renfro-Wadenstein, (9 C. C. A. 1931) 53 Fed. (2) 834, 838.

Franklin vs. Stoughton Wagon Co., (8 C. C. A. 1909) 168 Fed. 857, 859, 860.

In Re National Home & Hotel Supply Co., (District Court, E. D., Mich. 1915) 226 Fed. 840, 842.

Ellet-Kendall Shoe Co. vs. Martin, (8 C. C. A. 1915), 222 Fed. 851, 854.

In Re Pierce, (8 C. C. A. 1907) 157 Fed. 757.

McCallum vs. Bray-Robinson Clothing Co., (6 C. C. A. 1928) 24 Fed. (2) 35, 37.

Bransford vs. Regal Shoe Co., (5 C. C. A. 1916) 237 Fed. 67, 68.

Walter A. Wood Mowing & R. Machine Co. vs. Van Story, (4 C. C. A. 1909) 171 Fed. 375, 380.

John Deere Plow Co. vs. McDavid, (8 C. C. A. 1905) 137 Fed. 802, 808-809.

In *Eilers Music House vs. Fairbanks, supra,* the Washington Supreme Court construed a contract as one of consignment and approved a holding by the Nebraska Supreme Court that (p. 381):

> "A consignment of goods under a contract providing that the consignee shall receive them and return periodically to the consignor the proceeds of the sales at prices agreed upon or charged by the latter, is not a conditional sale, but a transaction of principal and factor."

In *General Electric Co. vs. Brower, supra,* Circuit Judge Gilbert speaking for this court said (p 601):

> "Nor was the contract rendered a contract of sale by reason of the fact that it contained no provision that the agent should keep the money separate and apart from its other moneys, or that it should turn over the money received from the sale to the manufacturer, but instead was to pay for the lamps sold each month, less 29%, for making the sales. *Eilers Music House vs. Fairbanks,* (Wash.) 141 Pac. 885."

Circuit Judge Ross speaking for this court in *In Re King, supra,* upheld as valid a consignment contract which provided, (p. 321) that the consignee would make a settlement each month by payment of an amount 20% less than the list price of

the tires sold, with a further 5% off of said list price for a settlement of accounts within thirty days as his commission. A monthly account was had between the consignor and consignee, at which time the consignee was billed as for a debt with the amount due for goods sold during the month.

In *In Re Renfro-Wadenstein, supra,* this court reversed a holding by Judge Neterer in which the Learned Trial Court had denied a consignor recovery of the proceeds of sales of its merchandise which the bankrupt had mixed with its own funds. Circuit Judge Wilbur speaking for the court says (p. 838):

> "It appears that after the execution of the consignment agreements the bankrupt continued to sell furniture in its possession without any attempt to keep separate the money or evidence of indebtedness received on account of goods so consigned, where written evidence of indebtedness was received from the purchaser. Instead of transferring these evidences of indebtedness to the appellants or holding them for their account, the bankrupt hypothecated such paper as had previously been its custom for the purpose of raising money for the conduct of the business and for making payments to his creditors, including appellants."

This court affirmed the Learned Trial Court in awarding the consignor a recovery of its merchandise and reversed the court in failing to award to the

claimant certain proceeds upon the sale of its merchandise.

In *Franklin vs. Stoughton Wagon Co., supra,* and *John Deere Plow Co. vs. McDavid, supra,* the Eighth Circuit Court of Appeals had before it similar consignment agreements which required monthly accountings of goods sold during the previous month and payment for such sales by the consignee. The contracts were held to be contracts of consignment.

In *In Re National Home & Hotel Supply Co., supra,* a consignment agreement was upheld which was silent as to the disposition of the proceeds of sales, bankrupt being merely required (p. 842) to render a monthly accounting and remit according to list prices for merchandise sold.

The consignment agreement which was held valid in *Ellet-Kendall Shoe Co. vs. Martin, supra,* contained no provision for keeping the proceeds of sale separate and merely required periodical payments for goods sold.

The Eighth Circuit Court of Appeals in *Re Pierce, supra,* upheld a consignment agreement which provided for the delivery of goods to a retailer for re-sale; the bankrupt was to pay all charges thereon; if the goods were unsold the bank-

rupt had the option to buy them or to hold the same for the wholesaler or to pay all charges thereon and to re-deliver them to the wholesaler; the bankrupt was to remit all cash received, less commissions, and to make settlement at the close of the selling season or whenever requested by the wholesaler; the bankrupt was to guarantee the notes of the purchasers and to have as his commission all amounts which he received for the goods above the consigned price.

In *McCallum vs. Bray-Robinson Clothing Co., supra,* the bankrupt fixed his own price, made some remittance at an "average" price and merely kept a separate account in his own ledger of the sales of consigned merchandise, (p. 37) and evidently therefore mixed the receipts from sales with his own funds. The contract was held to be a consignment.

The consignment agreement which was upheld in *Bransford vs. Regal Shoe Company, supra,* merely contained the provision that the consignee would on the first of each month render the consignor a complete, accurate and detailed statement of the sales of the consigned goods during the preceding month, and would at that time turn over in cash to the consignor the purchase price and one-half the

selling allowance of all consigned goods so sold by it. (p. 68.)

The Fourth Circuit Court of Appeals upheld the consignment contract in *Walter A. Wood Mowing & R. Machine Co. vs. Van Story, supra,* where (p. 380) the bankrupt was required to render the consignor at stated intervals reports of the amount of machinery on hand and that at the end of the year the consignor's agent took an inventory of the machinery. The bankrupt occasionally disposed of these machines which were then charged to the bankrupt. In some cases appropriations of this kind were not shown until the yearly inventory was taken, at which time the bankrupt was required to make settlement for the same. The bankrupt was authorized to purchase from the consignor such machines as the bankrupt might be able to dispose of to its regular customers. From the foregoing statement it is manifest that the proceeds of sales of consigned merchandise were mingled with the general funds of the bankrupt.

The only other serious contention which appellee made in the trial court was that where, as in this case, the bankrupt is to pay insurance, that that agreement is a badge of a sale and not of a bailment. The authorities are uniform that pay-

ment of taxes, insurance, cartage, freight and all other expenses, leaving the invoice price net to the consignor, does not disturb the agency relationship.

In the citations next following Your Honors will find underneath them a description of the insurance and other expenses which the consignees paid or agreed to pay on account of the consignor. In each case the relationship was held to be that of principal and agent and not of vendor and vendee:

Ludvigh vs. American Woolen Co., (1913) 231 U. S. 522, 524; 58 L. Ed. 345, 348.

"The property was to be insured for the benefit and in the name of the Woolen Co."

General Electric Co. vs. Brower, (9 C. C. A. 1915) 221 Fed. 597, 599.

Contract obligated consignee to pay all expenses in the storage, cartage, transportation, handling and sale of lamps, and all expense incident thereto and to the accounting and collection of accounts thus created.

In Re Renfro-Wadenstein, (9 C. C. A. 1931) 53 Fed. (2) 834, 835.

Contract required consignee to pay freight and carriage charges for delivery of goods to it, insure

same in name of consignor against damage by fire or water, care for the goods pending sale, and pay the expenses of the sale.

In Re Galt, (7 C. C. A. 1903) 120 Fed. 64, 66.

Consignee agreed to receive, store, pay freight, and keep under cover, in good condition and fully insured, at his own expense, all wagons; to pay all taxes on same.

In Re Pierce, (8 C. C. A. 1907) 157 Fed. 757.

Bankrupt was to pay all charges on the consigned goods.

Franklin vs. Stoughton Wagon Co., (8 C. C. A. 1909) 168 Fed. 857, 859.

Contract required consignee to pay all transportation charges, taxes, license, rents, and all other expenses incidental to the safekeeping and sale of the goods; to keep them insured for full value at expense of consignee in name and for benefit of consignor.

Ellet-Kendall Shoe Co. vs. Martin, (8 C. C. A. 1915) 222 Fed. 851, 854.

Consignee wrote "We carry insurance on our general stock and we will see that our insurance policy reads to cover consigned goods."

In Re National Home & Hotel Supply Co., (D. Ct. E. D. Mich. 1915) 226 Fed. 840, 846.

"I do not think the fact that the bankrupt paid the freight prevents petitioner from recovering."

McElwain-Barton Shoe Co. vs. Bassett, (8 C. C. A. 1916) 231 Fed. 889, 890-891.

Bankrupt agreed to pay all transportation charges, taxes, license, rent, and all other expenses incidental to the safe-keeping and sale of the shoes, to waive all claim against consignor for such expenses, to keep same insured at full value in name of consignor and for its benefit in companies satisfactory to it, to deliver policies to it and to become personally responsible for any loss caused by failure to insure; to sell for enough above invoiced prices to make its profit plus all expenses.

Mitchell Wagon Co. vs. Poole, (6 C. C. A. 1916) 235 Fed. 817, 819.

Consignee agreed to pay freight, storage, keep under cover in good condition, insure at his own expense, pay all taxes on wagons.

Bransford vs. Regal Shoe Co., (5 C. C. A. 1916) 237 Fed. 67, 68.

Consignee was to indemnify and save harmless the consignor from all loss, cost or expense arising

from loss or damage to the goods, caused by fire, accident or otherwise; and at its own expense to keep goods fully insured in name of consignor to an amount and in a company satisfactory to it.

McCallum vs. Bray-Robinson Clothing Co.,
(6 C. C. A. 1928) 24 Fed. (2) 35, 36.

Consignee made responsible for loss of goods whether by theft or otherwise, whether or not covered by insurance. Consignee to pay freight and express charges on all returned goods. Bankrupt required to insure stock for benefit of consignor.

For the foregoing reasons we respectfully submit that the decree of the Learned Trial Court should be reversed with instructions to dismiss that portion of the cause of action which seeks the recovery of the consigned merchandise, a recovery of the $227.23 which arose from the collection of accounts, which accounts resulted from the sale of garments made from consigned merchandise and that the decree should also be reversed in so far as it requires appellant to assign to the trustee the three accounts which arose in a similar manner and upon which nothing has been collected.

Respectfully submitted,

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